JHS:vlb 1-9-79

IN THE
SUPREME COURT OF THE UNITED STATES

Term, 19

No. 78-6020

MICHAEL M. BUSIC,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

GEFSKY, REICH AND REICH

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Petitioner, Michael M. Busic, prays that a Writ of Certiorari issue to review the Judgment on Rehearing of the United Staes Court of Appeals for the Third Circuit entered in this case on December 12, 1978 (Appendix "C").

Opinions Below

The Opinion and Order of the Trial Court (Appendix "A") is dated February 17, 1977 and, to the best of petitioner's knowledge, has not been printed by any official or unofficial reporter. The United States Court of Appeals for the Third Circuit filed an Opinion and Judgment on January 5, 1978 (Appendix "B"); and then on December 12, 1979, the United States Court of Appeals for the Third Circuit filed a Supplemental Opinion Sur Rehearing and Judgment (Appendix "C"). To the best of petitioner's knowledge, neither of the above Opinions of the Third Circuit Court of Appeals has been printed by any official or unofficial reporter.

Between the first and second Opinions filed by the Third Circuit, this Honorable Court decided the case of

Simpson, et al. v. United States, 435 U.S. 6, 55 L.Ed. 2770, 98 S.Ct. 909 (1978). Because Simpson addressed itself to the same question as the instant case, the Government petitioned for rehearing before the Lower Court, and after rehearing, the Lower Court again affirmed its original decision. Therefore, petitioner, Michael M. Busic, files this Petition.

Jurisdiction

The Supplemental Opinion Sur Rehearing and Judgment of the United States Court of Appeals for the Third Circuit was entered on December 12, 1978 (Appendix "C"). This Petition for Writ of Certiorari was filed within thirty days.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Did Congress authorize the additional penalty of 18 U.S.C. §924(c) for commission of an assault on federal officers when the underlying violation with firearms was already subject to an enhanced penalty under 18 U.S.C. §111?

2. As a matter of Double Jeopardy, are the offenses of an assault on federal officers with firearms and the use or carrying of firearms for an assault on federal officers sufficiently distinguishable to permit the imposition of cumulative punishment?

Constitutional and Statutory Provisions Involved

1. The United States Constitution, Fifth Amendment

> "No person . . . shall be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . ."

2. 18 U.S.C. §924(c)

> "(c) Whoever
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,
>
> shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony."

3. 18 U.S.C. §111

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interfers with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Statement of the Case

For simplicity, petitioner incorporates the summary of evidence contained in the Opinion of the United States Court of Appeals for the Third Circuit (Appendix "B"). Those portions of the Opinion discussing matters not material to the issues raised herein are omitted.

> "Michael Busic and Anthony La Rocca were involved in a conspiracy to distribute drugs which turned into an attempt to rob 'front money' from an undercover agent. This attempted robbery culminated in a shootout with federal agents.
>
> * * *
>
> "Charles D. Harvey, an agent of the Drug Enforcement Administration, first met Busic and La Rocca on May 7, 1976 at the home of Richard Hervaux, a government informant. At this time, defendants agreed with Harvey that Harvey would go to Florida to purchase drugs from one of the defendants' suppliers for re-distribution in the Pittsburgh area. (Tr. 21-22). Several days later, Harvey again met with the defendants and received samples

of the marijuana and cocaine which he was to purchase from defendants' Florida source. (Tr. 29-30.) The next day, after Harvey had arranged for his trip to Florida, La Rocca called him and insisted on seeing some 'front money'. A meeting was arranged for the following day in the parking lot of the Miracle Mile Shopping Center in Monroeville, Pennsylvania. (Tr. 32-33).

"As agreed, but having arranged for surveillance, Harvey went to the shopping center with $30,000 in cash. (Tr. 34-35). There he saw Busic and La Rocca in La Rocca's car. (Tr. 36). La Rocca entered Harvey's car, and the two drove to the other side of the parking lot. (Tr. 39). As Harvey removed the money from the trunk, La Rocca reached for his gun. Harvey ran, but La Rocca caught him and pointed his gun at Harvey's chest. Harvey then gave a pre-arranged signal to the surveillance agents. As the agents began to converge on the scene, La Rocca fired at Harvey, and missed. La Rocca then fired two shots at the vehicle containing agents William Alfree and William Petraitis, and two shots at the vehicle containing agent John Macready. (Tr. 40). He was immediately arrested and disarmed.

"Busic, who had been leaning on a nearby car during the shootout, was also arrested and disarmed, at which time he exclaimed, "Just remember that I didn't shoot at anybody and I didn't draw my gun." He was searched and a pistol was found in his belt; a search of La Rocca's car uncovered an attache case containing another pistol and a plastic box containing ammunition. (Tr. 41). When the car was further searched the following day, government agents found yet another pistol under the driver's seat and another box of ammunition in the glove compartment.

* * *

"The jury convicted defendants of conspiring to distribute drugs, unlawfully distributing narcotics, assaulting federal officers with a dangerous weapon, and receiving firearms while being convicted felons. In addition, each was convicted under a different subsection of 18 U.S.C. §924: La Rocca for having used (emphasis in the original) a firearm to commit the drug conspiracy and assaults on federal officers in violation of §924(c)(1); Busic for having carried (emphasis in the original) a firearm unlawfully during the commission of these felonies, in violation of 18 U.S.C. §924(c)(2). The sentencing judge imposed a five-year sentence on each defendant on the narcotics counts, five years on the assault with a dangerous weapon counts, and twenty years under the §924 counts -- all to run consecutively to each other -- for a total of 30 years for each defendant."

In the Supplemental Opinion Sur Rehearing, the Third Circuit rejected petition Busic's contention that, as a matter of

statutory construction, 18 U.S.C. §924(c) did not apply in those cases where the penalty for the underlying felony was already enhanced for use of a dangerous weapon. The Lower Court held that Simpson does not proscribe the imposition of consecutive sentences under 18 U.S.C. §111 and 18 U.S.C. §924(c)(2). The judgment of sentence as to petitioner Busic was affirmed (Appendix "C").

As to defendant La Rocca, the Third Circuit, on the basis of this Court's decision in Simpson, remanded for resentencing. On remand, the Government may elect to proceed under either 18 U.S.C. §924(c)(1) or 18 U.S.C. §111, but not both.

Argument

There are three separate reasons why this Court should grant a Writ of Certiorari and review petitioner's case. First, the Third Circuit misinterprets and misapplies Simpson v. United States, and petitioner is subjected to an additional penalty. * Secondly, Simpson may not have gone far enough to resolve conflicts between the Circuit Courts. There is still ambiguity concerning the overlap between 18 U.S.C. §924(c) and other criminal offenses. This ambiguity relates to whether an additional sentence can be imposed under 18 U.S.C. §924(c) after a defendant has already been convicted of an underlying felony which carries an enhanced penalty. This Court can clarify Simpson and provide uniformity. Finally, in Simpson, this Court left open an unresolved issue of great importance. Resolution of this Double Jeopardy issue is necessary, if petitioner is not entitled to relief on other grounds of statutory construction. Simpson

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* In Counts 17 and 18 of the indictment under §924(c), petitioner was charged with carrying a firearm in connection with assaults on federal officers and drug conspiracies. However, the trial judge charged the jury that they could convict on this charge if the firearm was carried in connection with either offense. The Opinions of the Third Circuit correctly note that it is impossible to determine whether or not the jury concluded that Busic carried a firearm in connection with both felonies. (Appendix "B", footnote 5; Appendix "C", page 2) For example, the drug conspiracies could have terminated by the time of the "shootout". Since the jury verdict could have been based on the conclusion that the firearm was carried in connection with the assaults alone, it is necessary to determine whether such a conviction and sentence under §924(c) can stand.

holds that where a defendant has been convicted of bank robbery with firearms under 18 U.S.C. §2113(d), which carries an enhanced penalty, and also convicted of using a firearm to commit a felony under 18 U.S.C. §924(c), such defendant may not be sentenced under both. The rationale of Simpson relied upon the legislative history and the language of the bill's sponsor, Representative Poff, as follows:

> "For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112 or 113, which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies." 114 Cong. Rec. 22232 (1968).

The language states that 18 U.S.C. §924(c) is inapplicable to violations under statutes which already carry an enhanced penalty. Although Simpson involves a bank robbery under 18 U.S.C. §2113(d), the sponsor's language specifically includes assaults on federal officers under 18 U.S.C. §111.

The Supplemental Opinion Sur Rehearing of the Third Circuit (Appendix "C") creates an illogical and unreasonabl distinction of 18 U.S.C. §924(c), which could result in obvious inequities. The Third Circuit reaches a different result in co-defendant La Rocca's case and petitioner Busic's case. La Rocca's case is remanded for resentencing under §924(c) or §111, but not both; petitioner Busic's case is affirmed. The Lower Court reached this result by distinguishing between subsections §924(c)(1) and (2), the distinction between "carrying" and "using" a firearm. The cited language of Representative Poff speaks of the statute as a whole, not divided into subparagraphs. There is no rational basis for treating these two subsections separately, nor does it appear that this Court in Simpson intended such a distinction.

If permitted, the distinction would lead to an absurd and illogical result. "Users" may receive one sentence; "carriers" may receive consecutive sentences. This is the impact as to the co-defendant in the instant case. There is no dispute that the goal behind the law is to discourage the use of firearms; the interpretation of the Third Circuit imparts a decided lack of reason to Congress in its statutory scheme when a wholly logical alternative interpretation is available. Representative Poff said his substitute did not apply to specific violations; §924(c) is completely logical if interpreted as not to apply to such violations. Obviously, the Lower Court misinterpreted Simpson, and this Court should issue a Writ of Certiorari.

It is still necessary to resolve conflicts between the Circuit Courts either created or left unresolved by Simpson. The Simpson rationale appears similar but not identical to the Sixth Circuit's decision in United States v. Eagle, 539 F.2d 1166 (1976). In Eagle, defendant, an Indian, was convicted of assaulting another Indian on a reservation in violation of 18 U.S.C. §1153, which carried an enhanced penalty, and using a firearm to commit the underlying felony under 18 U.S.C. §924(c). The Eagle Court held defendant could not be sentenced or prosecuted for the §924(c) violation. In several places, Simpson appears to agree with the Eagle rationale. In Simpson, the Court states as follows:

> "We believe that several tools of statutory construction applied to the statutes in a case like the present one -- where the Government relied on the same proof to support the convictions under both statutes -- require the conclusion that Congress cannot be said to have authorized the imposition of the additional penalty of §924(c) for commission of bank robbery with firearms already subject to enhanced punishment under §2113(d) . . ." (Citations ommitted) Simpson supra 435 U.S. at pp. 12, 13

Again the Court states:

> ". . . to construe the statute to allow the additional sentence authorized by §924(c) to be pyramided upon a sentence already enhanced

> under §2113(d) would violate the established rule of construction that "ambiguity concerning the ambit of criminal statutes should be resolved in favor or lenity." . . . The legislative history of §924(c) is of course sparse, yet what there is -- particularly Representaive Poff's statement and the Committee rejection of the Dominick amendment -- points in the direction of a congressional view that the section was intended to be unavailable in prosecutions for violations of §2113(d). . . ."
> (Citation ommitted) Simpson supra 435 U.S. at pp. 14, 15

Finally,

> " . . . our result is supported by the principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern, even if the general provision was enacted later . . ."
> (Citation ommitted) Simpson supra 435 U.S. at pp. 15, 16

Thus, the rationale of Simpson, especially the language quoted above, is consistent with Eagle. However, the matter becomes clouded by Simpson's instructions to the Lower Court on remand. The instructions are as follows:

> " . . . Accordingly, we hold that in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both §2113(d) and §924(c). The cases are remanded to the Court of Appeals for proceedings consistent with this opinion . . ."
> (Citation ommitted) Simpson supra 435 U.S. at p. 16

The Third Circuit in the instant case says Simpson rejects Eagle. Petitioner contends that Simpson adopts Eagle. There is need for further clarification.

The Fifth Circuit, in United States v. Nelson, 574 F.2d 277 (1978), decided after Simpson, attempts to interpret Simpson. In Nelson, defendant was convicted of bank robbery under 18 U.S.C. §2113(d) and using a firearm to commit a felony under 18 U.S.C. §924(c), and concurrent sentences were imposed. Because in Simpson consecutive sentences had been imposed, the Government attempted to argue that the differences in sentencing precluded Simpson's application. The Fifth Circuit disagreed and held that because Simpson made no reference to the distinction between consecutive and concurrent sentences, Nelson was entitled to have his §924(c) conviction vacated.

In Simpson, this Court declined to review the Constitutional question based on the applicability of the Double Jeopardy clause of the Fifth Amendment of the United States Constitution to the instant case. The holding and rationale instead was based exclusively on the statutory interpretation and legislative history of 18 U.S.C. §924(c). As argued in the two preceding arguments, relief can be granted to petitioner based on a statutory interpretation alone; but if this Court does not grant relief on this ground, then it can and should reach the the Constitutional question. Here, petitioner Busic has been subjected to multiple punishment based on two statutes which are not sufficiently distinguishable to permit the imposition of cumulative punishment. Therefore, petitioner, Michael M. Busic, respectfully requests that this Honorable Court grant a Writ of Certiorari.

Respectfully submitted:

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
vs.	:	Criminal Action No. 76-137
MICHAEL M. BUSIC and ANTHONY LaROCCA, JR.,	:	
Defendants	:	

OPINION

BARRON P. McCUNE, District Judge
February 17, 1977.

On July 1, 1976, a 19-count indictment was returned by the Federal Grand Jury of this district charging the defendants, Michael M. Busic and Anthony LaRocca, Jr., with various offenses: conspiracy to possess and distribute about fifty pounds of marijuana (Count 1) and one pound of cocaine (Count 2); the distribution of 0.3 grams of marijuana (Count 3) and 0.1681 grams of cocaine (Count 4); using a communication facility (a telephone) to facilitate the distribution of the above substances (Count 5); and various weapons offenses and gun possession violations (Counts 6 - 19).[1/] These charges arose out of a drug conspiracy and subsequent shoot-out with federal agents at the Miracle Mile Shopping Center, Monroeville, Pennsylvania, which took place on May 13, 1976.

The defendants were tried on these charges before a jury of this district and were found guilty[2/] on September 15, 1976.

1/ Of these counts, 7 (Counts 6-11, 13) applied to both defendants, 2 (Counts 12 and 19) applied to LaRocca only, and 5 (Counts 14-18) applied to Busic only.

2/ The defendant, LaRocca, was found guilty on all 14 charges brought against him. The defendant, Busic, was found guilty on 16 of 17 charges brought against him. Busic was found not guilty as to Count 17 of the indictment which charged a violation of 18 U.S.C. Sec. 924(c).

Presently before the court are the defendant's motions for Judgment of Acquittal and New Trial. After a thorough consideration of the briefs submitted by the respective parties, and following oral argument, we will deny the motions.

The evidence presented by the Government during the trial consisted of the testimony of those federal agents who were involved in an investigation into the defendants' alleged drug dealings and who were also present at the May 13, 1976 shoot-out. The Government's chief witness was Charles D. Harvey, an undercover agent with the Drug Enforcement Administration, Joint Narcotics Task Force.

Agent Harvey testified[3/] that he first met with the defendants in the late afternoon of May 7, 1976, at the Monroeville apartment of Richard Hervaux, a government informant. During that meeting it was agreed that Harvey would serve as a driver and would transport a quantity of marijuana from Florida to Pittsburgh for an intended distribution in this area. The next evening, May 8, 1976, a second meeting took place in Hervaux's apartment at which time the defendant, Busic, did not appear. At this meeting various prices for bales of marijuana and a pound of cocaine were discussed between Harvey and LaRocca.

Harvey did not meet with the defendants again until the evening of May 11, 1976, at which time Harvey was given samples of cocaine and marijuana which he took to the Allegheny County Crime Lab for analysis.

On May 12, 1976, LaRocca telephoned Harvey on two occasions. During one of the calls LaRocca supplied Harvey with a phone number in Florida so that Harvey could check the final

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3/ Portions of Harvey's testimony were substantiated by agents William J. Petraitis, William F. Alfree and John J. Macready, all of whom were present at the scene of the shoot-out on May 13, 1976

arrangements for closing the deal. By the time of the second call, Harvey had booked a flight to Florida under a fictitious name and communicated this to LaRocca. Later that day, at 5:30 P.M., Harvey called LaRocca and was informed by LaRocca that he wanted to see the "purchase money" prior to Harvey's trip. Harvey agreed to meet LaRocca the next day and show him the money.

Further, LaRocca instructed Harvey to call one, "Lewis", in Florida later that evening who would tell Harvey if all arrangements were in readiness. Harvey placed the call at 10:05 P.M. that night and the arrangements were confirmed.

On May 13, 1976, pursuant to LaRocca's request, Harvey called LaRocca at approximately 11:30 A.M., and informed LaRocca that he had acquired the money and would show LaRocca the money. They arranged to meet in the Miracle Mile Shopping Center in Monroeville, Pennsylvania, that afternoon. Pursuant to this arrangement, Harvey drove there alone (with surveillance units in support) and arrived at the designated location around 1:00 P.M. He had $30,000 of government money with him in a brown paper bag locked in his trunk. LaRocca and Busic arrived in LaRocca's car.

Harvey parked his car in the parking lot of the shopping center and the defendants pulled beside him and parked. Harvey then drove his car away from LaRocca's to a distance of "one-half block" away. Harvey then left LaRocca's car, as did LaRocca, and they met approximately half-way between the two cars. Together they walked to Harvey's car and entered it and Harvey drove to the far end of the parking lot. During this time, LaRocca, upon Harvey's request, took off his jacket and laid it on the front seat between them. After they stopped, both Harvey and LaRocca got out of the car. Harvey opened the trunk and the bag, and showed the money to LaRocca. They then re-entered Harvey's car and proceeded toward LaRocca's car. At this point, Harvey stated that he glanced down

at the seat and noticed "a revolver or a pistol" sticking out from under LaRocca's jacket. Harvey again parked about one-half block away from LaRocca's car for "safety" reasons. LaRocca then went for his weapon which caused Harvey to jump from his car and walk rapidly away from it. LaRocca chased him with his coat wrapped around the gun which he held, caught Harvey, cocked the gun, stuck it "in (Harvey's) chest" and demanded the money. La Rocca took Harvey's keys, opened the trunk, took the bag containing the money and backed away from Harvey intending to return to his car.

At that point, Harvey gave a pre-arranged signal to the other agents [4/] serving as surveillance units in this area who began to close in on LaRocca. Five shots were fired by LaRocca: one at Harvey, three at Macready and Ferrara's vehicle, two of which struc the passenger door; and one at Petraitis and Alfree's vehicle, which skimmed off the hood of the car and struck the windshield "head high." Within moments, LaRocca was arrested. [5/]

During this time, Busic was not involved in the gun fire. He testified that he had been in the shopping center purchasing a pack of cigarettes. [6/] He was arrested in the parking lot. A Beretta was found in his possession. Prior to his arrest he stated: "Just remember that I didn't shoot at anybody and I didn't draw my gun."

4/ The other agents were: Petraitis and Alfree; Morgan and Tate; a Macready and Ferrara.

5/ The gun which LaRocca was using was a .330 caliber Beretta which had a capacity of seven rounds. Upon analysis, it was determined that five rounds were fired, two rounds remained in the gun, and it remained cocked and ready to fire. Three shell casings were also found in the parking lot. One round was removed from a Lincoln Continental parked nearby.

6/ This aspect of the evidence was not conclusively proven through the testimony of Mary Lou Caliguri, a cashier at the Thrift Drug Store, Miracle Mile Shopping Center, Monroeville, Pennsylvania (TT. 373-380), although Busic so testified (TT. 410-411).

After the arrests were made, agent Petraitis looked into LaRocca's car and observed a black briefcase, which was open, on the floor in front of the passenger's seat. Upon an inspection of the briefcase, he discovered a semi-automatic Ruger pistol with a large cylinder (silencer) attached to the muzzle. Also found in the briefcase were two full magazines and a plastic box containing ammunition. The next day, an inventory search of the automobile was conducted. A box of .83 caliber ammunition was found in the glove compartment, and blackjacks and "noon choca" sticks were found in the trunk. Another Ruger, with a silencer attached, was found on the floor of the automobile under the driver's seat.

The defendant, Busic, testified on his own behalf to the effect that Richard Hervaux 7/ initiated the narcotics deal with the sole purpose of stealing the "front money" from Harvey, and represented to agent Harvey that the defendants were representative of a drug dealer in Florida. Further, Busic testified that by May 12, 1976, he and LaRocca had decided to back out of the deal but Hervaux was persistent about them going to the shopping center on the 13th in order to take the money from Harvey. In effect, Busic attempted by his testimony to show that he and LaRocca were victims of the Government's entrapment perpetrated by agent Harvey and the informer, Hervaux.

This entrapment defense was contradicted by the Government's rebuttal witness, Curwood Masters, a special agent for the Bureau of Alcohol, Tobacco and Firearms, United States Treasury Department, who testified that from 8:10 P.M. until 9:15 P.M. on May 5, 1976, two days prior to Harvey's initial meeting with the

7/ Hervaux was not called by either the government or the defendant Fred C. Koerhner, the court-appointed private investigator for Busi stated that he knew Hervaux's address, had been to his apartment twice, that Hervaux had tried to call Koerhner without success and Koerhner had been unable to serve a subpoena. However, although he had been appointed during the first week of August, 1976, he had no tried to serve a subpoena until Friday, September 10, 1976, after trial was underway. Trial began September 3, 1976. Koerhner tried again Sunday night, September 12, 1976.

defendants, he was forced to hide in the closet of Hervaux's apartment (when he happened to be there when LaRocca unexpectedly dropped in) and while so located, overheard a conversation between LaRocca and Hervaux. He testified that LaRocca, and not Hervaux, initiated a conversation concerning narcotics and that LaRocca approached Hervaux about buying marijuana at that time.

With this factual background established, we turn to a consideration of the various arguments advanced by the respective defendants.

Pretrial Rulings

With regard to this court's pretrial rulings, defendants advance three contentions. First, both defendants allege that this court's refusal to sever the trials of the defendants consituted error. Second, they allege error in this court's refusal to sever their trial on firearms charges from the other counts of the indictment, thereby permitting the Government to prove both defendants' prior criminal convictions. Thirdly, they contend that this court erred in refusing to grant a continuance to them when the court-appointed investigator required additional time to track down recently discovered leads bearing on their entrapment defense. We disagree with all of the above contentions.

The tests for joinder of counts and defendants are found in Rule 8(b) of the Federal Rules of Criminal Procedure. See, United States v. Somers, 496 F.2d 723, 729, fn. 3 (3d Cir. 1974), cert den. 419 U.S. 832, 95 S. Ct. 56, 42 L. Ed. 2d 58 (19 Rule 8(b) provides:

> "(b). Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

The severance of offenses or defendants is a matter committed to the discretion of the trial court and will not be disturbed absent a clear showing that this court abused that discretion. United States v. Armocida, 515 F.2d 29, 46 (3d Cir. 1975), cert. den., 423 U.S. 858, 96 S. Ct. 111, 46 L. Ed. 2d 84 (1975).

In the instant case, the various criminal acts, including the firearms violations, charged in the indictment which were supported by the evidence, revealed a common criminal scheme in which the defendants jointly participated. Thus, this court properly exercised its discretion in permitting the counts and the defendants to be tried together. See, United States v. Stringi, 378 F. 2d 896 (3d Cir. 1967), cert. den. 389 U.S. 846, 88 S. Ct. 100, 19 L. Ed. 2d 113 (1967).

Defendants' third contention is likewise without merit for two reasons. First, Fred C. Koerhner, the court-appointed private investigator for the defendant, Busic, had all of a month to investigate and was permitted to continue his investigation during the defendants' trial (TT.6). Although he was unsuccessful in serving Richard Hervaux, he did not try to serve him until trial was underway. Second, the entrapment defense was sufficientl raised by Busic's testimony without Koerhner's investigatory assistance. Hervaux was an informant but he was well known to both defendants.[7a/] Further, we were required to try defendants speedily.

The Conspiracy Counts

Both defendants, in their post-trial motions for Judgment of Acquittal, contend that the evidence presented by the Government at trial was legally insufficient to establish the existence of a conspiracy as charged in Counts 1 and 2 of the

7a/ Hervaux is a motorcycle dealer. Incidentally, Curwood Masters had gone to Hervaux's apartment to discuss a motorcycle.

indictment. We disagree. As to Counts 1 and 2, a review of the record reveals that the evidence presented was more than sufficie to establish that a conspiracy to distribute drugs existed. Agent Harvey's testimony, as substantially summarized, supra, clearly reveals that the defendants did meet and conspire together, from May 7, 1976, to May 13, 1976, for the purpose of ultimately posses ing and distributing certain drugs for their own profit.

As to Count 5, defendants contend that since the drug transactions were never completed, 21 U.S.C. Sec. 843(b) [8/] was not violated. In support they cite United States v. Leslie, 411 F. Supp. 215 (D. Del. 1976). Our research indicates that this is the only case to date which has discussed this particular issue. However, we cannot agree with the decision of that court. In Count 5, certain violations of 21 U.S.C. Sec. 846 were alleged. These violations of Sec. 846 are felonies within the meaning of Sec. 843(b). Thus, although actual distribution never took place, the evidence was sufficient to show that certain acts proscribed by Sec. 846 and punishable under Sec. 843(b), took place, and, therefore, Sec. 843(b) was violated. See United States v. Turner 528 F.2d 143, 165 (9th Cir. 1975). We, therefore, find no merit in defendants' arguments as to the charges contained in Counts 1, 2 and 5.

Firearms Violations

Both defendants, in their post-trial motions for Judgment of Acquittal, contend that the evidence presented by the

8/ Section 843(b) of Title 21 of the United States Code provides in pertinent part:

"It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of (Title 21, respecting Drug Abuse Prevention and Control). . . . Each separate use of a communication facility shall be a separate offense under this section. . . .(T)he term "communication facility". . . includes. . .(the) telephone. . ." (Emphasis supplied).

Government at trial was legally insufficient to establish their guilt on the firearms violations as charged in Counts 13-16 of the indictment. They contend that, as to all of these counts, the evidence failed to establish a sufficient nexus with foreign and/or interstate commerce. Further, with regard to Count 13, they contend that the evidence failed to establish (1) that LaRocca was aided and abetted by Busic in receiving a firearm, and (2) the time and venue of LaRocca's receipt of the firearm. We must disagree with the above contentions.

Count 13 charged violations of 18 U.S.C. Sections 922(h)[9] and 924(a),[10] arising out of LaRocca's receipt (aided and abetted by Busic) of a .22 caliber long rifle, Strum-Ruger Standard, semi-automatic pistol, serial number 11-87863, which had been transported in interstate commerce. His receipt of this pistol occurred subsequent to two convictions of March 16, 1970 and December 12, 1973, and his release from prison on January 12, 1976.

The record reveals that Busic purchased this pistol on April 5, 1973, from Gerald Braverman, Vice-President of Braverman Arms Company, Wilkinsburg, Pennsylvania (TT. 93), and that this pistol was manufactured in Southport, Connecticut (TT. 99). Subsequent to Busic's purchase of this pistol, this weapon was found in LaRocca's possession. The evidence thus revealed that LaRocca received this weapon after its interstate shipment and within the Western District of Pennsylvania. We believe that this

9/ Section 922(h) provides, in pertinent part:
"(h) It shall be unlawful for any person --
(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;. . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

10/ Section 924(a) provides, in pertinent part:
"(a) Whoever violates any provision of this chapter. . . shall be finednot more than $5,000, or imprisoned not more than five years, or both. . . ."

evidence was sufficient to show the time and venue of receipt by LaRocca of this weapon.

Counts 14 through 16 applied to Busic only and charged violations of 18 U.S.C. Sec. 1202(a)(1).[11] Count 14 concerned Busic's possession of a Beretta which he was carrying at the time of his arrest. Counts 15 and 16 concern his possession of two Strum-Rugger pistols. As to these three counts, Busic contends th there was no showing of a recent interstate nexus as to the offens of possessing as required by United States v. Bass, 404 U.S. 336 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971).

It is clear that with regard to Counts 14 - 16, Busic's conviction cannot stand unless an interstate nexus is shown. United States v. Bass, supra. Our research of the law reveals that the Third Circuit has not (to date) discussed or ruled upon the "possession" offense of Sec. 1202(a)(1). However, on two occasions courts of this district have addressed this issue. Unit States v. Graves, 394 F. Supp. 429, 434 (W.D. Pa. 1975); United States v. Letky, 371 F. Supp. 1286, 1289-90 (W.D. Pa. 1974). In both cases it was noted, citing Bass, that as to the offense of possessing, the interstate commerce requirement is satisfied if it is shown that at the time of the possession, the firearm was moving interstate, or on an interstate facility, or if the possession affected commerce. Further, both of these cases held that this interstate commerce requirement was met by proof that at any time prior to possession the firearm had traveled in interstate

11/ Section 1202(a)(1) provides:
"(a) Any person who - -
(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, . . . and who receives, possesses or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not morethan two years, or both."

commerce. We believe that the evidence presented by the Government at trial was sufficient to satisfy the interstate commerce requirement enunciated in Bass, and set forth in cases within this District.

Assault Charges

Busic contends in his motion for Judgment of Acquittal that the evidence was legally insufficient to establish his participation with LaRocca in the assaults on the federal officers who were involved in the shoot-out of May 13, 1976, as charged in Counts 6 and 7 of the indictment, in violation of 18 U.S.C. Sections 2, 111, 1114.

Busic argues that when the defendants went to the shoppi center on May 13, 1976, for the purpose of robbing Harvey, only LaRocca perpetrated the actual assault on Harvey and the other supporting agents; and that Busic never participated in these actions, nor did he draw or fire his weapon. Thus, he argues that although the evidence supports a finding of a conspiracy by LaRocc and Busic to rob and assault Harvey, it does not support a finding that he conspired with LaRocca to assault the other officers prese at the scene. Therefore, he asserts that it was error for this court to charge the jury under Pinkerton v. United States, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), that these "additional" assaults were in furtherance of their original conspiracy to possess and distribute drugs. We disagree.

We believe that LaRocca's acts are attributable to Busic. The evidence is clear that the defendants conspired and made arrangements with certain individuals in Florida to obtain a certain quantity of marijuana and cocaine for the purpose of distributing these drugs in the Pittsburgh area. Agent Harvey was

originally asked to transport these narcotics for them from Flori to Pittsburgh. After Harvey showed an interest in possibly obtai ing a quantity of these drugs and offered a sum of money for thei purchase, the defendants conceived of a scheme to rob Harvey on M 13, 1976.

To say that their assault on the federal officers was n in furtherance of their original conspiracy relating to the obtai ing and distributing of drugs is completely contrary to the evidence presented. Harvey was present at the shopping center only the purpose of showing them the "front money" for the purchase of the discussed drugs. The arrangements for the sale, the Florida trip and the notice of the trip to the defendants' drug connection in Florida had been made. All that was left to be performed was the trip itself and the payment by Harvey. At any rate, the cash which Harvey brought with him that day was to be used for the intended purpose of purchasing the drugs previously discussed. Harvey, himself, was not certain that a robbery was to occur, but was required to protect himself and the government money. Clear the evidence presented a continuing conspiracy, and the intended robbery of Harvey by the defendants on May 13, 1976, was in furt ance of their original drug conspiracy. Therefore, although Bus did not physically participate in the shoot-out and assaults, he was and remained as much a part of the original conspiracy as wa LaRocca, and is, thus, just as responsible for the actions of LaRocca in the assaults on the other federal officers involved a LoRocca is. The jury was entitled to infer that if defendants l stolen the money they could have used it to buy the drugs for themselves.

For these reasons, we likewise find no merit in Busic argument that the evidence was insufficient to establish that h unlawfully possessed a firearm and participated in the various

felonies, including the assaults on the federal officers, as charged in Count 18 of the indictment, which charged a violation of 18 U.S.C. Sec. 924(c), a separate offense which forbids the carrying of a firearm during the commission of any felony prosecutable in federal court.

Entrapment

The defendants' arguments in support of this defense revolve around the actions of the government's informant, Richard Hervaux, prior to May 13, 1976. During the various meetings involving the defendants and agent Harvey, which took place in Hervaux's apartment, Hervaux was always present.

In support of an entrapment defense, Busic advances the following argument: that he testified that it was Hervaux that conceived the plan to rob Harvey on May 13th under the pretext of selling him drugs, and that Hervaux, not the defendants, provided the quantities of marijuana and cocaine which were given to Harvey; moreover, although Busic readily admitted a plan to rob Harvey, he continually denied that he was involved in a scheme to transport and sell large quantities of cocaine and marijuana from Florida. We find no merit in these arguments.

The most recent pronouncement by the Supreme Court concerning the defense of entrapment is found in Hampton v. United States, 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976), wherein the following is stated:

> "If the result of the governmental activity is to 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission. . . ,' the defendant is protected by the defense of entrapment."

425 U.S. 490, 96 S. Ct. 1650. This court properly charged on

entrapment in the manner set forth in 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, Sec. 13.13 (2d Ed. 1970, 1975 Supplement) which was cited with apparent approval by this Circuit in United States v. Silver, 457 F.2d 1217, 1220 (3d Cir. 1972), and later expressly approved in Government of Virgin Isla v. Cruz, 478 F. 2d 712, 717, n.5 (3d Cir. 1973), and United Stat v. Watson, 489 F.2d 504, 506 (3d Cir. 1973).

The jury had ample evidence before it that the defenda LaRocca, initially approached Hervaux on May 5, 1976, concerning a possible purchase of marijuana. When Busic entered into negotiations and discussions which began on May 7, 1976, and lasted through May 12, 1976, their contact in Florida had been establis and all plans had been made for Harvey's trip to Florida to obta quantities of marijuana and cocaine and distribution of these dr in this area. Although Busic testified that Hervaux initiated the discussions conerning the drugs, the testimony of Curwood Masters sufficiently rebutted this line of testimony and the jur was justified in believing that the defendants had the predisposition to devise the scheme for the drug purchase and carry ou plans to that end. Therefore, the defendants' entrapment arguments are without merit.

Jury Charge

Both defendants advance three essential arguments on their post-trial motions. First, they contend that the court incorrectly charged the jury regarding the firearms charges involving their movement in interstate commerce by stating that this element was satisfied if the evidence showed movement in foreign or interstate commerce at any time. Second, they conten that the court erred in refusing to charge the jury regarding th Government's failure to call Richard Hervaux, a government informant and essential witness, who was peculiarly under the

Government's control. Thirdly, Busic contends that with regard to the assault charges, this court erroneously charged the jury to the effect that he was guilty of the assaults if he went to the shopping center as part of a conspiracy to rob Harvey and did not withdraw. LaRocca advanced a similar argument with regard to the conspiracy charges against him, namely that this court erroneously charged the jury that a conspiracy to rob Harvey was merely a continuation of an ongoing conspiracy to distribute drugs. We are compelled to reject the first and third arguments for the reasons stated earlier in this opinion.

Only the second argument deserves a brief comment here. Hervaux would have indeed been an important witness in this case. However, he was not, as defendants contend, peculiarly under the Government's control. He was available to be called by either party. In fact, the defendants knew his address and, through Koerhner, attempted to subpoena him without success. We do not believe that the Government's failure to call Hervaux as a witness, therefore, justified a charge to the effect that Hervaux's testimon would have been adverse to the Government if he had been called. We thus find no merit in this argument by defendants.

We likewise find no merit in the defendants' remaining contentions, and therefore dismiss their motions for Judgment of Acquittal and New Trial.

An appropriate order follows.

BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
vs.	:	Criminal Action No. 76-137
MICHAEL M. BUSIC, and ANTHONY LaROCCA, JR.,	:	
Defendants	:	

ORDER

AND NOW, February 17, 1977, the defendants' Motion for Judgment of Acquittal and New Trial are hereby denied. Imposition of sentence is fixed for March 11, 1977, at 3:00 P.M. in Court Room No. 10.

BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1375

77-1376

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL BUSIC,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY LA ROCCA, JR.,

Appellant.

Appeal from the Judgment and Conviction
of the United States District Court
for the Western District of Pennsylvania.

Argued October 21, 1977

Before Van Dusen and Rosenn, Circuit Judges,
and Stern,* District Judge

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* Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

APPENDIX "B"

OPINION OF THE COURT

(Filed JAN 5 1978)

STERN, District Judge

On this appeal we must decide whether a defendant may receive consecutive sentences for the crime of assault with a dangerous weapon [18 U.S.C. §111] and the crime of use of a firearm to commit that felony [18 U.S.C. §924(c)(1)], where the dangerous weapon used in the assault is a firearm. We hold that such sentencing violates the double jeopardy clause and we remand La Rocca's case to the district court for re-sentencing.

Defendants also cite as error the trial court's refusal to sever for trial those counts of the indictment which required proof of defendants' prior felony convictions. We hold that, on the facts of this case, the refusal to sever those counts was harmless error. The other challenges raised by defendants, including the contention that the trial court erred in refusing to give a "missing witness" instruction, we find to be without merit and, thus, we affirm defendants' convictions in all other respects.

I.

As the record at trial reveals, Michael Busic and Anthony La Rocca were involved in a conspiracy to distribute drugs which turned into an attempt to rob "front money" from an undercover agent. This attempted robbery culminated in a shootout with federal agents.

On this appeal, we must view the evidence in the light most favorable to the government. See Glasser v. United States, 315 U.S. 60 (1942). Thus viewed, the evidence might be summarized as follows. Charles D. Harvey, an agent of the Drug Enforcement Administration, first met Busic and La Rocca on May 7, 1976 at the home of Richard Hervaux, a government informant. At this time, defendants agreed with Harvey that Harvey would go to Florida to purchase drugs from one of the defendants' suppliers for re-distribution in the Pittsburgh area. (Tr. 21-22). Several days later, Harvey again met with the

defendants and received samples of the marijuana and cocaine which he was to purchase from defendants' Florida source. (Tr. 29-30). The next day, after Harvey had arranged for his trip to Florida, La Rocca called him and insisted on seeing some "front money". A meeting was arranged for the following day in the parking lot of the Miracle Mile Shopping Center in Monroeville, Pennsylvania. (Tr. 32-33).

As agreed, but having arranged for surveillance, Harvey went to the shopping center with $30,000 in cash. (Tr. 34-35). There he saw Busic and La Rocca in La Rocca's car. (Tr. 36). La Rocca entered Harvey's car, and the two drove to the other side of the parking lot. (Tr. 39). As Harvey removed the money from the trunk, La Rocca reached for his gun. Harvey ran, but La Rocca caught him and pointed his gun at Harvey's chest. Harvey then gave a pre-arranged signal to the surveillance agents. As the agents began to converge on the scene, La Rocca fired at Harvey, and missed. La Rocca then fired two shots at the vehicle containing agents William Alfree and William Petraitis, and two shots at the vehicle containing agent John Macready. (Tr. 40). He was immediately arrested and disarmed.

Busic, who had been leaning on a nearby car during the shootout, was also arrested and disarmed, at which time he exclaimed, "Just remember that I didn't shoot at anybody and I didn't draw my gun." He was searched and a pistol was found in his belt; a search of La Rocca's car uncovered an attache case containing another pistol and a plastic box containing ammunition. (Tr. 41). When the car was further searched the following day, government agents found yet another pistol under the driver's seat and another box of ammunition in the glove compartment. (Tr. 44).

In addition to evidence regarding the conspiracy and subsequent shootout, the government also introduced in its case-in-chief evidence of defendants' prior convictions for the purpose of proving that defendants were convicted felons and, thus, had received firearms in violation of 18 U.S.C. §922(h). Counsel for the defendants stipulated that Busic and La Rocca had been jointly convicted in 1973 for assault on two federal officers, theft of government property

and use of a firearm to commit these felonies. These convictions were introduced through the testimony of agent Petraitis and the actual certificates of conviction, although the government was not permitted to elicit the facts underlying these convictions. (Tr. 195).

Defendants raised the defense of entrapment. Busic took the stand on his own behalf, claiming that Hervaux had initiated the scheme to rob Harvey and further claiming that, despite his and La Rocca's efforts to back out of the scheme, Hervaux had urged them on. (Tr. 388-414). La Rocca did not himself testify, but called his common-law wife, Janna K. Sam, who testified that La Rocca avoided the repeated phone calls he received from Hervaux during the time period in question. (Tr. 470-472) In addition, defendants attempted to show the unavailability of Richard Hervaux, through the testimony of their court-appointed investigator, Fred Koerhner, who testified that he had twice attempted, unsuccessfully, to serve Hervaux. (Tr. 381). At this time, the government offered itself to serve Hervaux, but defense counsel declined the offer. (Tr. 385-386). Defendants requested, and were denied, a "missing witness instruction" which would have instructed the jury that it was entitled to draw an adverse inference based on the government's failure to call Hervaux to the stand.

The jury convicted defendants of conspiring to distribute drugs, unlawfully distributing narcotics, assaulting federal officers with a dangerous weapon, and receiving firearms while being convicted felons. In addition, each was convicted under a different subsection of 18 U.S.C. §924: La Rocca for having used a firearm to commit the drug conspiracy and assaults on federal officers, in violation of §924(c)(1); Busic for having carried a firearm unlawfully during the commission of these felonies, in violation of 18 U.S.C. §924(c)(2). The sentencing judge imposed a five-year sentence on each defendant on the narcotics counts, five years on the assault with a dangerous weapon counts, and twenty years under the §924 counts -- all to run consecutively to each other -- for a total of 30 years for each defendant.

II

Defendants' first and most formidable challenge is directed at 18 U.S.C. §924. That statute penalizes a person who either:

> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States.

18 U.S.C. §924(c) (Emphasis supplied). The statute further provides for a mandatory sentence of one-to-ten years for first offenders, and two-to-twenty-five years for subsequent offenders.[1/]

Busic was indicted, convicted and sentenced under subsection (2) of this statute for having carried a firearm unlawfully during the commission of two federal felonies: drug conspiracy and assault on federal officers; La Rocca was indicted, convicted and sentenced under subsection (1) for having used a firearm to commit these same felonies. In addition, each defendant received consecutive sentences

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1/ The full text of 18 U.S.C. §924(c) provides as follows:

> (c) Whoever --
>
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,
>
> shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

under the enhanced penalty provision of 18 U.S.C. §111 for having assaulted federal officers with a "dangerous or deadly weapon."[2/]

A

Defendants argue that conspiracies to commit drug offenses (21 U.S.C. §846) and assaults on federal officers (18 U.S.C. §111) are not "felonies" within the meaning of 18 U.S.C. §924(c). We disagree.

Section 924, Title 18, is part of the Gun Control Act of 1968, enacted in the wake of the political assassinations of that decade. The purpose of that legislation was "to strengthen Federal controls over interstate and foreign commerce in firearms and to assist the states effectively to regulate firearms traffic within their borders." H. Rep. No. 1577, 90th Cong. 2d Sess., reprinted in (1968) U.S. Code Cong. and Ad. News 4410, 4411. Toward that end, Congress enacted 18 U.S.C. §924(c)(2) which makes it a federal crime to possess an unregistered firearm, federal jurisdiction being predicated upon commission of a federal felony while in possession of such a weapon. The statutory scheme shows that Congress was concerned not only about persons who possess unregistered firearms, but also about persons who, although in lawful possession of a firearm, use it to commit a federal felony. See 114 Cong. Rec. 22235-7 (1968). Thus, in subsection (1)

2/ Title 18 U.S.C. §111 provides for a sentence of up to three years for simple assault; up to ten years where an assault is committed with a "deadly or dangerous weapon":

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

of the statute, Congress created a crime separate from that created in subsection (2), making it a federal crime to use a firearm -- whether registered or unregistered -- to commit a federal felony.

In view of the broad objectives of the legislation, we cannot agree with defendants that the term "felony" in §924(c)(1) should be narrowly construed so as to exclude narcotics conspiracies and assaults on federal officers.[3/] The construction urged by defendants would limit the ambit of subsection (2) whose purpose was to reach the unlawful possession of all firearms, with commission of a federal felony being merely a jurisdictional linchpin. Accordingly, we hold that §924 emcompasses the federal felonies with which defendants were charged.

B.

A different question is posed, however, as to whether the double jeopardy clause protects a defendant from being convicted both of the

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3/ That Congress intended the term "felony" to be broadly construed finds support in the legislative history of §924. During the House debates on the bill, Representative Casey proposed a version that would have limited the operation of the statute to certain enumerated violent crimes. See 114 Cong. Rec. 21061-3; 21765-5. The rejection of this version suggests that Congress did not wish to thus limit the statute. Indeed, in keeping with the ambitious purposes of the statute, §924 has been applied to a broad range of felonies. See, e.g., United States v. Howard, 504 F.2d 1281 (8th Cir. 1974) (counterfeiting); United States v. Ramirez, 482 F.2d 807 (2nd Cir.), cert. denied, 414 U.S. 1070 (1973) (narcotics offenses conspiracy); United States v. Sudduth, 457 F.2d 1198 (10th Cir. 1972) (sale of heroin).

The only suggestion to the contrary is the remarks of Representative Poff, the bill's sponsor, that:

> For the sake of legislative history, it should be noted that my substitute is not intended to apply to Title 18, Sections 111, 112, or 113 which already define the penalties for use of firearms in assaulting officers, with Sections 2113 or 2114 concerning armed robberies of the mail or banks, with Section 2231 concerning armed assaults upon process servers or with Chapter 44 which defines other felonies.

114 Cong. Rec. 23904-5 (1968). Although a strong statement by the sponsor of a bill made expressly for the sake of legislative history carries great weight, it is not necessarily dispositive and we need not narrowly construe this statute -- which by its language and legislative history was obviously intended to be broad in its reach -- on the basis of this statement.

crime of use of a dangerous weapon to assault a federal officer (18 U.S.C. §111) and use of a firearm to commit that felony [18 U.S.C. §924(c)(1)]. On this, there appears to be some disagreement among the circuits.

In United States v. Engle, 539 F.2d 1166 (8th Cir. 1976), cert. denied, 97 S.Ct. 1146 (1977), defendant, an Indian, was convicted of assault with a dangerous weapon upon the person of another Indian on a reservation, in violation of 18 U.S.C. §1153. The defendant was also convicted for use of a firearm to commit the offense, as proscribed by 18 U.S.C. §924(c)(1). The Eighth Circuit avoided the double jeopardy issue, holding as a matter of statutory construction that Congress did not intend Section 924 to encompass statutes that already provide for added penalties where weapons are used. In so holding, it relied on the remarks of Representative Poff, the bill's sponsor, that §924 should not be construed to encompass felonies for which there is already an added penalty for the use of a weapon. See, 114 Cong. Rec. 23904-5 (1968).

In United States v. Crew, 538 F.2d 575 (4th Cir. 1976), cert. denied, 97 S.Ct. 144 (1977), defendant was convicted under 18 U.S.C. §2113, the federal bank robbery statute which, like 18 U.S.C. §111, provides for an enhanced penalty where a "dangerous weapon" is used. He was also convicted under §924(c)(1) for using a firearm to commit that felony, and under §924(c)(2) for carrying a firearm unlawfully during the commission of that felony. He received consecutive sentences under each of these three counts. The Fourth Circuit held that conviction and consecutive sentences under both §2113 and §924 (c)(1) did not violate the double jeopardy clause because each statute requires proof of different elements:

> In order to sustain a conviction under Section 2113(d) the government must establish that the perpetrator assaulted a person, or jeopardized the life of a person, by using a dangerous weapon or device during the commission of the robbery. In comparison, in order to sustain a conviction under Section 924(c) the government must establish that the perpetrator used or carried a firearm during the commission of a felony. The appellants would have us equate "using a dangerous weapon or device" with "used or carried a firearm" and find that the prohibition against double jeopardy has been violated. However, it is clear that Congress never intended to equate these terms.

> The passage of Section 924(c) was a Congressional reaction to demands for "gun control" in the wake of political assassinations. It is a narrowly drawn statute intending to discourage a felon from using or carrying a firearm, and does not encompass the use of any weapon or device during the course of a bank robbery which jeopardized the lives of others. Therefore, the offenses are not identical in law and fact, and the separate sentences under Sections 2113(d) and 924(c) are affirmed.

Id., at 477-478.

A somewhat different approach was taken by a district court in United States v. Hearst, 412 F.Supp. 877 (N.D.Cal. 1976) in ruling on a motion to dismiss an indictment charging both armed bank robbery and use of a firearm to commit that felony. Although it denied the motion, the court indicated that consecutive sentences under both counts might contravene the constitutional guarantee against double jeopardy:

> ... [I]t is a settled principle of law that two separate offenses arising out of the same act or transaction may be charged where "each [statutory] provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299 304 ... (1932). This standard is satisfied by the two offenses charged here, for the reason that the first requires the use of any dangerous weapon in the robbery of a bank, whereas the second specifically requires the use of a firearm in the commission of any felony.
>
> It is, of course, an altogether different question whether the defendant may or should be punished twice through consecutive sentences for the conviction of two offenses arising out of a single act. In denying the motion to dismiss either indictment for violation of the double jeopardy clause the Court does not intend to foreclose the defendant from raising the question of double punishment should she be convicted under both counts of the indictment and the Court be required to pass sentence. In that eventuality the Court will be open to any arguments the defendant may have against compounding sentences for these alleged offenses.

Id., at 878-879. (Emphasis in original).

We agree that an indictment charging violation of both sections 111 and 924(c)(1) does not on its face implicate the double jeopardy

clause: §111 punishes assault with a deadly or dangerous weapon -- which could be a knife or an explosive as well as a firearm; §924(c)(1) punishes the use of a firearm to commit a felony -- which could be any felony. However, where the deadly weapon used in a §111 charge is a firearm and the felony charged in a §924(c)(1) count is an assault and the government does not prove additional elements for either offense, it is clear that a defendant will be twice punished for the identical offense if he is sentenced under both counts.

Multiple punishment for the same offense at a single trial is forbidden by the double jeopardy clause. Ex Parte Lange, 85 U.S. (18 Wall.) 163, 173 (1873). See generally, Note, Twice in Jeopardy, 75 Yale L.J. 262 (1965). In a line of cases, the Supreme Court has continued to assume the validity of this principle, but has generally found the misconduct at issue to constitute distinct offenses. See, e.g., Gore v. United States, 357 U.S. 386 (1958), reh. denied, 358 U.S. 858 (1958); Blockburger v. United States, 284 U.S. 299 (1932); Morgan v. Devine, 237 U.S. 632 (1915); Gavieres v. United States, 220 U.S. 238 (1911); Burton v. United States, 202 U.S. 344 (1906). The test enunciated by the Court is whether "each provision requires proof of a fact which the other does not." Blockburger v. United States, supra, at 304. See also, United States v. Kenny, 462 F.2d 1205 (3rd Cir.), cert. denied, 409 U.S. 914 (1972); United States v. Johnson, 462 F.2d 423 (3rd Cir. 1972), cert. denied, 410 U.S. 932 (1973).[4/]

4/ For the sake of clarity, we would note that the principles of double jeopardy relied on herein are distinguishable from the principles relied on by the Supreme Court in ruling on the propriety of consecutive sentencing under the subsections of the bank robbery statute, 18 U.S.C. §2113. In Prince v. United States, 352 U.S. 322 (1957), the Court held as a matter of statutory construction that consecutive sentences could not be imposed under the subsections of that statute. Following Prince, we held in United States v. Corson, 449 F.2d 544 (3rd Cir. 1971) (en banc), that where a defendant is convicted under more than one subsection of §2113 the sentencing judge should impose a general sentence on all counts not to exceed the maximum permissible sentence which carries the greatest maximum sentence. See generally, Note, The Federal Bank Robbery Act - The Problem of Separately Punishable Offenses, 18 Wm. & Mary L.Rev. 101 (1976). Also distinguishable is the "merger" theory wherein a lesser included misdemeanor is said to merge into a felon thus permitting a sentence on only the latter. See generally, 22 C.J.S. Criminal Law §10, at 42-6.

On the facts of this case, it is clear that the elements proven under the §111 counts (Counts 6 and 7) and the §924(c)(1) count (Count 19) were identical: under Counts 6 and 7 the government proved assault on federal officers with a dangerous weapon which was a firearm. Under Count 19, the government proved use of the identical firearm to commit a felony which was the assault on the identical federal officers. Accordingly, we hold that when La Rocca was sentenced under Count 19 consecutively to Counts 6 and 7, he was twice punished for the same conduct. We remand this case to the district court at which point the government must move for resentencing under either Count 19 or Counts 6 and 7.[5/] The trial court may not impose a more severe sentence under either count. To do so would ignore the clear intent of this opinion and punish the defendant twice for the same offense. In future cases, where conviction is obtained under both §111 and §924(c)(1), and it is determined that the "deadly weapon" charged in the §111 count is the firearm charged in the §924(c)(1) count, and that the "felony" charged in the §924(c)(1) count is the assault charged in the §111 count, the court may sentence the defendant under one of the sections or the other, but may not sentence under both sections.

C.

While prosecution under the use provision of §924(c)(1) may, as in this case, create double jeopardy problems when coupled with a §111 count, prosecution under the carrying provisiosn of §924(c)(1) will not. The latter subsection contains an element not required to be proved under §111: the government must prove that the firearm was

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5/ While we recognize that La Rocca was charged in the §924 count with using a firearm to commit both assault and conspiracy, we cannot sustain his §924 sentence based on commission of conspiracy. It is a fair inference from the record that the conspiracy to distribute drugs terminated as of the time that defendants decided to rob Harvey. Nor are the convictions on the conspiracy counts conclusive, for the jury was entitled to convict defendants on these counts even if it found that the conspiracy was shorter in duration than was charged in the indictment. See, e.g., United States v. Somers, 496 F.2d 723 (3rd Cir.), cert. denied, 419 U.S. 832 (1974). In any event, since both conspiracy and assault were charged as the underlying felonies in Counts 6 and 7, we cannot tell on which the jury relied.

carried "unlawfully." As we read it, the term "unlawfully" requires the government to prove that the defendant's possession of the firearm violated federal, state or local registration laws. See, United States v. Rivero, 532 F.2d 450 (5th Cir. 1976); United States v. Howard, 504 F.2d 1281 (8th Cir. 1974); United States v. Ramirez, 482 F.2d 807 (2nd Cir.), cert. denied, 414 U.S. 1070 (1973). Therefore, as to Busic, consecutive sentences under §111 and §924 (c)(2) were premissible.[6/]

III

Defendants also cite as error the refusal of the district court to sever those counts of the indictment which charge them with receiving firearms while being convicted felons in violation of 18 U.S.C. §922(h).[7/] The indictment actually set forth in these counts that both defendants had been convicted in 1973 for assaulting two federal officers, theft of government property, and use of a firearm

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6/ We are mindful of the potential injustice caused by our decision today: La Rocca, who actually shot at the federal agents, may receive a lesser sentence than Busic, who was only vicariously liable for these assaults. However, the district court has authority to cure this disparity on a motion under Fed.R.Crim.P. 35.

7/ 18 U.S.C. §922(h) provides in pertinent part:

> (h) It shall be unlawful for any person -
>
> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> . . .
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

to commit these felonies and, in addition, that La Rocca had also been convicted in 1970 of trafficking in machine guns, assault and battery, pointing a deadly weapon and possession of narcotics. On oral argument in this Court, however, it was agreed that the indictment was never shown to the jury.

Defendants argue that the district court's refusal to sever the §922 counts resulted in admission into evidence of their prior convictions in the government's case-in-chief which prejudiced them in the trial of the other offenses charged.

The question of severing for trial counts requiring proof of prior convictions from other counts which do not permit such proofs has received little attention in the circuits.[8/] In United States v. Park, 531 F.2d 754 (5th Cir. 1976), the defendant had been charged in a two-count indictment with a substantive narcotics offense and with receiving firearms while being a convicted felon. On appeal, he contended that he had been prejudiced at trial by joinder of these counts because it enabled the government to bring to the jury's attention the fact that he was a convicted felon. The Fifth Circuit held that the trial court's refusal to sever was not error because defendant's prior conviction for having knowingly manufactured drugs wou in any event, have been admissible on the other count. See also, United States v. Abshire, 471 F.2d 116 (5th Cir. 1972). A novel approach to this problem was adopted by the district court in United States v. Franke, 331 F.Supp. 136 (D.Minn. 1971). There, on a motion for severance, the district court granted defendant a two-stage trial, whereby the jury, having reached a verdict on the other counts, would then proceed to consider the counts requiring proof of prior convictions.

8/ Although little appellate attention has been directed to this issue, it appears that it has been the practice of some district courts to sever such counts. See e.g., United States v. Napier, 518 F.2d 316 (9th Cir.), cert. denied, 423 U.S. 895 (1975); United States v. Roberts, 503 F.2d 453 (8th Cir. 1974).

The defendants urge that the district court erred in refusing to sever the counts alleging violation of 18 U.S.C. §922(h), inasmuch as at the outset of the trial the district court had no way of knowing that the prior convictions alleged in the §922(h) counts might otherwise have been admissible on the other counts. On the facts of this case we find that the district court did not commit reversible error since the defendants raised the defense of entrapment at trial and the evidence of their prior convictions was admissible under Rule 404(b), Federal Rules of Evidence, to rebut this defense by proving predisposition. In addition, prejudice was minimized in this case: the jury was never shown the indictment, and the government was not permitted to elicit the factual basis of these convictions. For these reasons, we hold that the refusal to sever was harmless error.

Nevertheless, we think that in ruling on a pre-trial motion to sever the district court should determine whether evidence of the prior convictions would be independently admissible on the other counts. If it is determined that the convictions would not be admissible on the other counts -- that were these counts to be tried alone the jury would not hear this evidence -- then severance should be granted.[9/] In addition, we think that, in framing an indictment, the better practice dictates that the government should not set forth the details of defendants' actual convictions, but merely allege that the defendant is a convicted felon.

9/ Of course, we do recognize the difficulties inherent in such pre-trial determinations. Nevertheless, if the government chooses to join such counts, it must be prepared to justify the joinder to the trial judge by some showing that the prior convictions would be admissible even absent joinder. By the same token, in moving for severance of these counts, a defendant may be required to reveal some of his trial strategy, as to an entrapment defense or the like, in the resolution of his motion for severance.

If Defendant desires the particulars, he may, of course, so move for them. See Fed.R.Crim.P. 7.

IV

Defendants further contend that the trial court committed reversible error in refusing to instruct the jury that it might draw an adverse inference from the government's failure to call its informer, Richard Hervaux. Despite the fact that the government actually offered to serve Hervaux, defendants contend that the burden of calling him rested on the government, and that the government's failure to do so entitled defendants to a "missing witness" instruction. We agree with the district court that defendants were not entitled to the requested charge.

The basis of the "missing witness" inference is that, where a party fails to call an available witness whose testimony could be expected to favor him, a natural inference arises that that witness would have exposed facts unfavorable to that party. See, Graves v. United States, 150 U.S. 118, 121 (1893); Burgess v. United States, 440 F.2d 226 (D.C.Cir. 1970); 2 Wigmore, Evidence, 162, §289 (3d Ed. 1940). This Court has on several occasions addressed the applicability of this inference. Thus, in United States v. Jackson, 257 F.2d 41 (3rd Cir. 1958), we reversed a conviction based on the trial court's refusal to permit defense counsel to comment on the government's failure to produce its key informant, a man known only as "Sarge". In United States v. Restaino, 369 F.2d 544 (3rd Cir. 1966), however, we held that the government's failure to produce defendant's co-defendants who had pleaded guilty, and were known to and available to both sides, did not give rise to any inference as to whom their testimony could be expected to favor. More recently, in United States v. Hines, 470 F.2d 225 (3rd Cir. 1972), cert. denied, 410 U.S. 968 (1973), we held that the government's failure to call an identification witness

would also not give rise to any inference. There, after stating that its application requires the witness to have special, non-cumulative information relevant to the case, we went on to note the weakness of the missing witness inference:

> Clearly, every absent but producible witness possessing some knowledge of the facts need not be made the subject of the inference. Often all that can be inferred is that the witness' testimony would not have been helpful to a party, not that the testimony would have been adverse.

470 F.2d at 230. (Emphasis in original).

As we noted in Hines, a party's failure to call a witness does not necessarily imply that the witness's testimony would have been unfavorable to that party. Although Hervaux may have had special knowledge relevant to this case, we think other considerations outweigh this reason for giving the missing witness instruction. Every experienced trial lawyer knows that the decision to call a witness often turns on factors which have little to do with the actual content of his testimony. Considerations of cumulation and jury fatigue may preclude calling a witness who is entirely helpful; calculations that a witness may help a lot but hurt a little may compel restraing when counsel believes that his burden is already met. Then, too, questions of demeanor and credibility, hostility, and the like may influence the government not to produce a witness whose testimony might be entirely harmful to the defendant.[10/] And, of course, as we noted in Hines, in many instances, a witness's testimony might have been neither helpful nor adverse to the party who failed to call him. Indeed, cases such as this one -- where both parties fail to call an available witness -- shatter the myth that an absent witness's testimony might be expected to be particularly favorable to either side.

Accordingly, we hold that where neither the government nor the defendant call a witness who is available to both, the "missing witness" instruction does not properly lie. See, United States v. Kenney,

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10/ We cannot help but note that the defendant who in summartion asks the question, "Why didn't the government call 'X'?" relies on the inability of the government to respond by advising the jury of any of these considerations, all of which are outside the record and some of which stem from the subjective judgment of the prosecutor.

500 F.2d 39 (4th Cir. 1974); United States v. Chase, 372 F.2d 453 (4th Cir.), cert. denied, 387 U.S. 907 (1967); United States v. Higginbotham, 451 F.2d 1283 (8th Cir. 1971).[11/] Under these circumstances, no inference as to the content of the missing testimony is possible since both sides may be presumed to wish to call a favorable witness, while both would not wish to call one who was adverse. This is not to say that the defendant does not have the absolute right to stand mute or to rest on the government's failure to produce affirmative evidence to substantiate any necessary elements of the offense charged. But it is one thing to rely on the government's failure of proof, and quite another to argue the existence of affirmative evidence, which the jury did not hear, inferred from the mouth of a witness who was not called. Thus, we agree with the district court that, under the circumstances of this case, defendants were not entitled to the missing witness instruction.

V

Defendants also challenge the trial court's refusal to sever their cases for trial, the admission into evidence of the rebuttal testimony of Special Agent Masters, and the sufficiency of the evidence to sustain Busic's conviction for assault.[12/] We find these challenges

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11/ The basis for denying an instruction under these circumstances was perhaps best stated by Judge Robb in his concurring opinion in Burgess v. United States, supra, at 239: "Having deliberately rejected an opportuni to produce a witness a defendant should not be permitted to complain that the witness is missing."

12/ Defendant Busic concedes that he aided and abetted the assault on Harvey, who was not a federal officer. However, he challenges the sufficiency of the evidence to sustain his conviction for assaulting federal officers Alfree, Petraitis and John Macready. We find this contention to be without merit since the evidence overwhelmingly supports his convictio under both a conspiracy and an aiding and abetting theory. See Nye & Nis v. United States, 336 U.S. 613 (1949); Pinkerton v. United States, 328 U. 640 (1946).

to be without merit.[13/] Thus, we affirm Busic's conviction in all respects. La Rocca's case is remanded to the district court for resentencing on either the counts alleging violation of 18 U.S.C. §111 or the count alleging violation of 18 U.S.C. §924(c)(1).

To the Clerk:

Please file the foregoing opinion.

HERBERT J. STERN, U.S.D.J.

13/ We have also considered and rejected the following challenges raised by defendants in their pro se briefs:

"1. Whether the remarks actions and conduct of the trial prosecutor was so flagrant and inflamnatory, or so prejudicial and violative of due process to justify a new trial.

2. Whether or not appellants were deprived of a fair trial when the trial court denied them a severance; in light of the extreme prejudice to one defendant or the other inevitable.

3. Whether the trial judge was prejudicial to the extent of depriving appellants of a fair and impartial trial.

4. Whether appellants were deprived of due process when they were deprived of a prompt post-arrest arraignment.

5. Whether the defendants were deprived of due process when the government failed to produce the key government alleged informant in the case -- Richard Jervaux.

6. Whether the appellants were deprived of due process when they were denied Jenks Act discoverable materials.

7. Whether or not appellants were deprived of effective assistance of counsel, and counsel who suppressed evidence favorable to his clients.

8. Whether or not the government met its burden to sustain the convictions that appellants conspired to obtain, distribute and sell controlled substances; or that any conspiracy existed at all."

(Appellants' Pro Se Brief, at 7).

United States Court of Appeals

for the Third Circuit

Nos. 77-1375/77-1376

UNITED STATES OF AMERICA

vs.

BUSIC, MICHAEL

Michael M. Busic, Appellant in No. 77-1375

UNITED STATES OF AMERICA

vs.

LA ROCCA, ANTHONY

Anthony La Rocca, Jr., Appellant in No. 77-1376

(D. C. Criminal Nos. 76-137-1 and 76-137-2)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: VAN DUSEN and ROSENN, Circuit Judges and STERN, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on October 21, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 15, 1977, be, and the same is hereby affirmed as to appeal No. 77-1375. The appeal at No. 77-1376 is remanded for proceedings in accordance with the opinion of this Court.

ATTEST:

Clerk

January 5, 1978

*Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

771-520-9/0-73-111-527

UNITED STATES COURT OF APPEALS
for the Third Circuit

Nos. 77-1375
77-1376

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL BUSIC,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY LA ROCCA, JR.,

Appellant.

Appeal from the Judgment and Conviction of the United States District Court for the Western District of Pennsylvania.

SUPPLEMENTAL OPINION SUR REHEARING

(Reargued June 7, 1978)

Before Van Dusen and Rosenn, Circuit Judges, and Stern,* District Judge

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APPENDIX "C"

* Herbert J. Stern, United States District Judge for the District

SUPPLEMENTAL OPINION SUR REHEARING

(Filed DEC 12 1978)

STERN,* District Judge

On the government's petition for rehearing, we reconsider our opinion in United States v. Busic, Nos. 77-1375 and 77-1376 (3rd Cir., January 5, 1978) in light of the Supreme Court's subsequent decision in Simpson v. United States, ___ U.S. ___, 46 U.S.L.W. 4159 (February 28, 1978). Although we reach the same conclusion, we do so on somewhat different grounds.

In Simpson v. United States, the Court held that a defendant may not receive consecutive sentences under section 924(c) and under the subsection of the Bank Robbery Statute, 18 U.S.C. §2113(d), which provides for an enhanced penalty where a "dangerous weapon or device" is used.[1/] The Court noted that "[c]ases in which the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing ... raise the prospect of double jeopardy," but declined to reach the constitutional question. Instead, it based its decision on the legislative history of section 924(c), on the "policy of lenity" which in close cases counsels against the imposition of additional penalties, and on the principle of statutory construction which gives "precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern ..." ___ U.S. at ___.

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* Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

1/ 18 U.S.C. §2113(d) provides that:

> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

In light of Simpson, we conclude that we need not have reached the constitutional question in Busic, and accordingly we vacate Part II-B of our opinion. We next address two additional questions raised by Simpson: first, whether as to La Rocca, the government on resentencing is permitted to elect to proceed under either section 924(c)(1) or section 111; second, whether as to Busic, the Simpson decision prohibits the consecutive sentences under section 111 and section 924(c)(2).

We believe that the Simpson decision did not adopt the approach of the Eighth Circuit in United States v. Eagle, 539 F.2d 1166 (8th Cir. 1976), cert. denied, 429 U.S. 1110 (1977), which held that a crime for which the penalty is enhanced by use of a dangerous weapon cannot form the basis of a prosecution under section 924(c)(1). Rather, we believe that under Simpson, the government is free to prosecute under either section, provided that the defendant is not sentenced under both.[2/] We are supported in this view by Justice Brennan's closing words in Simpson: "in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both §2113(d) and §924(c)." ___ U.S. ___ (emphasis supplied). Moreover, we believe that this conclusion is consistent with the Congressional purpose of section 924(c) which, as we noted in our first opinion, was to control and severely penalize the use of firearms.[3/]

2/ Thus, since La Rocca's section 111 sentence was to run concurrently with his sentences on the other counts, should the government elect to proceed under section 924 rather than under section 111, he may receive the identical sentence which he earlier received. This would be entirely consistent with our reading of the Simpson opinion.

3/ On reargument, the government again asks that we sustain the section 924(c)(1) sentence using as a predicate La Rocca's conviction for narcotics conspiracy. Although we note that the jury was charged that it could convict La Rocca for having used a firearm during commission of either the assault or the narcotics conspiracy, we reiterate that it is impossible to ascertain on which of these felonies the jury relied. See Slip op., fn. 5.

We also believe that the Simpson opinion does not proscribe the imposition of consecutive sentences under section 111 and section 924(c)(2). We adhere to the view which we expressed in our earlier opinion, that subsection (2) of section 924 creates an entirely separate offense from that punishable under section 111, since it requires that the government prove the weapon was carried "unlawfully". 4/ The Court in Simpson, faced only with the imposition of consecutive sentences under the bank robbery statute and section 924(c)(1), had no occasion to differentiate between the two subsections of section 924(c). In view of our reading of the different Congressional purposes underlying the two subsections of section 924(c), we believe that Simpson applies only to subsection (1) of section 924(c).

Accordingly, as to Busic, we again affirm the imposition of consecutive sentences under section 924(c)(2) and section 111. La Rocca's case is remanded for resentencing, at which time the government may elect to proceed under either section 924(c)(1) or section 111, but not both.

TO THE CLERK:

Please file the foregoing supplemental opinion.

HERBERT J. STERN
District Judge

4/ We are buttressed in this view by the fact that the weapon which Busic was convicted for having "carried unlawfully", was a different weapon from that used by La Rocca in committing the underlying assault, charged to Busic pursuant to 18 U.S.C. §2. Thus, on the facts of this case, it is clear that Busic's conviction under section 924(c)(2) was for a crime completely separate from his conviction for assault with a dangerous weapon.

United States Court of Appeals

for the Third Circuit

Nos. 77-1375/77-1376

UNITED STATES OF AMERICA

vs.

BUSIC, MICHAEL

Michael M. Busic, Appellant in No. 77-1375

LA ROCCA, ANTHONY

Anthony La Rocca, Jr., Appellant in No. 77-1376

(D.C. Criminal No. 76-137-1 and 2)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ROSENN and VAN DUSEN, Circuit Judges and STERN, District Judge*

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was reargued by counsel on June 7, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed March 15, 1977, ~~be, and the same is hereby~~ are hereby affirmed with respect to appellant Busic and remanded for the resentencing of appellant La Rocca, at which time the government may elect to proceed under section 924 (c)(1) or section 111, but not both, all in accordance with the opinion of this Court.

ATTEST:

M. Elizabeth Ferguson

Chief Deputy Clerk

December 12, 1978

*Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

FPI-LS-8-10-72-12M-327